United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4218

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILK DRIVERS & DAIRY EMPLOYEES, LOCAL 338,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JOHN D. BURGOYNE,
Attorney,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Union violated Section 8 (b)(1)(A) and (2) of the Act by maintaining and enforcing provisions in its collective bargaining agreements which make its Stewards the most senior employees in their crafts, thereby granting them preferential rights with respect to the assignment of overtime, positions, shifts, hours, days-off, transfers, promotions and vacation schedules; and by causing the Company to

discriminate in favor of its Steward Howard Rosengrandt and against employee Peter J. Daniels with respect to the award of a driver route.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*), for enforcement of its order issued on July 29, 1975, against Milk Drivers & Dairy Employees, Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union").[1] The Board's Decision and Order (A. 68-94)[2] was issued by the full Board (Chairman Murphy and Members Jenkins, Kennedy and Pennello, with Member Fanning dissenting) and is reported at 219 NLRB No. 107. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred at various places in the States of New York, Connecticut and elsewhere.

I. THE BOARD'S FINDINGS OF FACT

The facts in this case were stipulated by the parties and are as follows:

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[1] The Board also issued an order against Dairylea Cooperative Inc. (the "Company"). However, the Company has agreed to comply voluntarily with the Board's order and accordingly the Board has not sought enforcement against the Company in this proceeding.

[2] "A." references are to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. Background; the Union's Collective Bargaining agreements

For many years the Union has had collective bargaining agreements with the Company and a number of other named employers covering employees who process, sell and deliver milk (A. 70; 6, 17, 20, 22-24).[3] All of these contracts have contained clauses relating to the seniority of Union Stewards which are identical or substantially similar (A. 6, 17, 20). Thus, the contract between the Union and the Company, running from November 30, 1971, to November 30, 1973, provided as follows (A. 70; 31-32):

> 9. (a) There shall be a Steward or Stewards, but not more than one for each craft per shift, at every Delivery Branch, Pasteurizing Plant, and Garage to see whether the members of the Union and the Employer live up to the provisions of this agreement and the rules of the Union, not inconsistent with this agreement, and to report any infraction of such provisions and rules to the Superintendent who shall promptly correct them. Such Steward or Stewards shall be selected by the Union and each shall be an employee of the place in which he is Steward. There shall be no discrimination against Stewards for Union activities. The Steward shall have no authority to alter, amend, violate or otherwise change any part of this agreement. The Steward shall report to the Business Agent of the Union any violations of this agreement.
>
> (b) *The Steward shall be considered the Senior employee in the craft in which he is employed,* and if there is more than one Steward, seniority, as between the Stewards shall be based on their Company seniority. The Superintendent or Branch Manager shall recognize the Steward as a representative of the Union locally, and shall inform him, prior to the laying off of employees, and of all union personnel

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[3] The other employers – a total of 17 – are listed in Appendix A to the Board's Decision and Order (A. 88-89).

> changes. The Shop Steward shall bring to the attention of the Employer's representative, as provided in paragraph 9 (d) hereof any hardship on any employee. The Employer shall entertain no complaint involving an alleged breach of any provision of this agreement until the complaining party has given a written statement of such complaint to the Steward or delegate. (Emphasis added.)

In other paragraphs the contract provided that seniority controlled with respect to the assignment of overtime, layoffs, bidding for vacant or advanced positions, selection of days of rest, transfers, selection of shifts and the choice of vacation time (A. 70-71; 33-42).

These provisions have appeared in the Union's contracts since 1937. There is no evidence presently available concerning the negotiations in which the provisions were initially adopted (A. 64, 65-66). During the history of the Union's bargaining, no proposals have been made for the elimination or modification of the contractual provisions relating to the seniority of Stewards (A. 65).

B. Union Steward Rosengrandt is awarded a route over employee Daniels even though Daniels has greater Company seniority

Around December 27, 1972, the Company posted a notice of bid for "Route No. 10" at its Nanuet, New York, facility (A. 71; 24, 44). Union Steward Howard Rosengrandt, employee Peter Daniels, and a number of other employees submitted bids for the job (A. 71; 24, 44-50). On January 10, 1973, Rosengrandt was awarded the job by the Company over Daniels, even though Daniels had worked for the Company for more than 24 years longer than Rosengrandt (A. 71; 25, 43). Rosengrandt's bid prevailed solely because of the provisions of the collective bargaining

agreement granting him the highest seniority based on his position as Union Steward (A. 71; 25).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, Member Fanning dissenting, found that the Union violated Section 8(b)(1)(A) and (2) of the Act by maintaining and enforcing provisions in its collective bargaining agreements which grant its Stewards the highest seniority with respect to terms and conditions of employment other than layoff and recall. The Board also found that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing the Company to discriminate in favor of Union Steward Rosengrandt and against employee Daniels because of Rosengrandt's status as Steward (A. 77).

The Board's order requires the Union to cease and desist from the unfair labor practices found and from "in any like or related manner" restraining or coercing the Company's employees, or the employees of the other named companies with whom it has such contracts, in the exercise of their Section 7 rights. Affirmatively, the order requires the Union, jointly and severally with the Company, to make Daniels whole for any losses sustained by him and to post appropriate notices (A. 81-84, 92-94).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY MAINTAINING AND ENFORCING PROVISIONS IN ITS COLLECTIVE BARGAINING AGREEMENTS WHICH GRANT ITS STEWARDS THE HIGHEST SENIORITY WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT OTHER THAN LAYOFF AND RECALL, AND BY CAUSING THE COMPANY TO DISCRIMINATE IN FAVOR OF A STEWARD AND AGAINST AN EMPLOYEE

1. In the landmark case of *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954), the Supreme Court was required to interpret the correlative Sections 8(a)(3) and 8(b)(2) of the Act.[4] Noting that the key words of the Sections were "discrimination" and "to encourage or discourage membership in any labor organization," the Court stated that (347 U.S. at 40-42):

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[4] The Sections provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer–

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That

(continued)

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts . . . . No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.

While acknowledging the relevance of motivation in establishing unlawful discrimination under these sections, the Court went on to hold that (347 U.S. at 44-46):

> specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3). . . . Both the Board and the courts have recognized that

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[4] (continued)

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
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> (b) It shall be an unfair labor practice for a labor organization or its agents –
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> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initation fees uniformly required as a condition of acquiring or retaining membership;

> proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.

Finally, the Court reaffirmed the power of the Board to infer that certain types of conduct naturally will result in the prohibited encouragement or discouragement of union membership even though the record in any particular case fails to show that employees were in fact encouraged or discouraged. 347 U.S. at 48-52.

In subsequent cases, the Court developed an exception to the *Radio Officers'* principle. The Court held that a showing by the employer (or union) of a substantial and legitimate business purpose might under certain circumstances constitute a defense in a case involving conduct which by its nature encouraged or discouraged union membership or otherwise infringed upon employee rights. See *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227, 228, 231 (1963); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311-313 (1965); *N.L.R.B. v. Brown*, 380 U.S. 278, 287, 289 (1965). The Court summarized its holdings in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967), as follows:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse

> effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

In the present case, the Board held that the Steward seniority clause – and its application in the case of employee Daniels – is (1) discriminatory within the meaning of *Radio Officers'* and (2), to the extent that it goes beyond layoff and recall and affects other working conditions, lacks legitimate and substantial business justifications within the meaning of *Great Dane*. Accordingly, the Board held that the clause was illegal under the Act. We show below that the Board's conclusion is correct.

2. The facts, *supra*, pp. 3-4, shows that the Union's contracts with the Company and other named employers make its Steward "the Senior employee in the craft in which he is employed," and that seniority controls with respect to a number of conditions of employment, e.g., layoff, overtime, better jobs, etc. The effect of these provisions is to give the Union's Stewards preference over all of the other employees with respect to these conditions of employment even though length of service with the Company ordinarily determines entitlement to these benefits. A striking example of this condition is the Company's award of "Route No. 10" to Union Steward Rosengrandt over employee Daniels despite the fact that Daniels had 24 more years of working time with the Company (*supra*, p. 4). In sum, Rosengrandt obtained the job solely because of his position as Steward for the Union.

The Board found that the Steward seniority provision of the contracts was discriminatory within the meaning of Sections 8(a)(3) and 8(b)(2) of the Act because it "ties job rights and benefits to union activities, a dependent relationship essentially at odds with the policy of the Act, which is to insulate one from the other" (A. 73). The Board's conclusion is plainly correct. The Steward seniority provision discriminates between the regular employees and the Steward in the granting of benefits precisely because of the Steward's position as a representative of the Union. Such a distinction necessarily encourages the employees not only to become and remain union members, but to become better members, i.e., to support and work for the Union, for this is the way that employees may achieve Stewards' status and the attendant advantages. As the Board stated (A. 73):

> the Union will not turn for help to employees uninterested in its success, much less to those who are opposed to it. . . . [I]t is obvious that an employee must be a committed unionist if he is to have a chance to acquire the broad benefit preference provided by the super seniority clause. For him to refrain from union activities – as of course he has a right to do under the Act – would be to exclude himself from ever obtaining such preference.

The provision, then, is clearly one of the types of discrimination referred to by the Supreme Court in *Radio Officers'* and *Great Dane* which inherently encourages union adherence and, as such, is unlawful regardless of either the Company's or Union's motivation in adopting it or its actual impact upon the employees. See *N.L.R.B. v. Int. Ass'n of Machinists, Lodge 727, etc.*, 279 F.2d 761, 766 (C.A. 9, 1960), cert. denied, 364 U.S. 890 (contract provision which deprived employees of their seniority if they transferred out of the unit to a union-represented unit but not if they transferred to an unrepresented unit held inherently discriminatory and

thus illegal regardless of motive or impact, the court stating that the "plain, if not indeed almost irresistible, inference to be drawn with reason from the questioned provisions of the IAM-Menasco agreement is that the contract tends to discourage membership in unions other than the IAM by those employees who transfer from the production unit"). See also, *N.L.R.B. v. Local 50, Bakery Workers,* 339 F.2d 324, 326, 328 (C.A. 2, 1964), cert. denied, 382 U.S. 827 (union violated Act by causing employer to deny union member his seniority after he worked for employer during strike contrary to union rule, the Court noting that the union's action "would serve in the future to encourage fellow workers to remain *active* Union members during a strike"); *N.L.R.B. v. Local 282, Teamsters,* 412 F.2d 334, 337 (C.A. 2, 1969), cert. denied, 396 U.S. 1038 (union violated Act by stripping member of his seniority because of his anti-union actions, the Court stating that the "necessary effect of such action by the union is to serve notice upon all employees that an employee's challenge to the union's authority could result in the loss of his job security"). And, of course, there is no question that, apart from actual enforcement, the mere maintenance of discriminatory contractual provisions is violative of Sections 8(a)(3) and 8(b)(2) of the Act. See *N.L.R.B. v. Gottfried Baking Co.,* 210 F.2d 772, 779-780 (C.A. 2, 1954); *Local 138, Operating Engineers v. N.L.R.B.,* 321 F.2d 130, 137 (C.A. 2, 1963); *N.L.R.B. v. Local 2, Plumbers,* 360 F.2d 428, 435-436 (C.A. 2, 1966).

Before the Board, the Union argued that, because of the valid union security clauses in its contracts (A. 30), all of the employees are required to become and remain members; that accordingly the discrimination caused by the Steward seniority provisions is not on the basis of Union members against non-members but on the basis of members against other members; and that discrimination of this kind is permissible under the Act. This argument is plainly wrong. In the first place, it is well settled that even

though the collective bargaining agreements may require union membership as a condition of employment, the Union cannot compel actual membership but only the payment of its dues and fees. *Buckley v. American Fed. of Television and Radio Artists,* 496 F.2d 305, 312-313, n. 5 (C.A. 2, 1974), cert. denied, 419 U.S. 1093. Accord: *N.L.R.B. v. Hershey Corporation,* 513 F.2d 1083, 1085-1086 (C.A. 9, 1975), and cases cited. Thus, despite the union security provision, the employees are free to abstain from becoming union members if they so wish, provided they continue to make the required dues payments. To the extent, then, that the Steward seniority clause discourages this choice by making other job benefits dependent on actual membership, it is patently illegal. Even assuming, however, that all of the employees are in fact union members, it is equally well settled, as the *Radio Officers'* case cited above makes clear, that employees are still free under the Statute to be "good, bad or indifferent members" if they so choose. Accord: *N.L.R.B. v. Local 50, Bakery Workers, supra,* 339 F.2d at 327 ("it is clear to us, moreover, that the provisions of the Labor Act under consideration are meaningful only if they are read to forbid such 'discrimination' not only between union members and non-members or between good members and bad members but in all decisions which depend primarily upon union membership considerations"). Thus, discrimination of the kind here, which ties job benefits to active union participation and support, is just as illegal as discrimination against non-members.

3. Before the Board, the Union argued that, even if the Steward seniority clause was discriminatory, it was justified on either of two grounds. First, the Union asserted that the Board and the Courts have held that the Union, as the employees' representative, is entrusted with a substantial amount of discretion in formulating and negotiating seniority systems covering the employees, see *Ford Motor Company v. Huffman,* 345 U.S. 330, 337-339, 342 (1953), and consequently it was proper for

the Union, in agreement with the employers, to negotiate the clause as part of a comprehensive seniority system in a collective bargaining agreement. The Board properly rejected this claim. While it is true that the Union as a general rule does possess a considerable amount of discretion in devising seniority systems, this discretion does not include the right to impose on the employees a seniority system that is otherwise unlawful under the Act. As the Ninth Circuit stated in rejecting the identical contention in *N.L.R.B. v. Int. Ass'n of Machinists, Lodge 727, etc., supra,* 279 F.2d at 765:

> But while the latitude necessary to allow a union and an employer to negotiate an agreement must as a practical matter be broad enough to permit them to draw distinctions between different classes of employees . . . , still this latitude is plainly limited by the public policy, expressed in the Act itself, which forbids either union or employer to discriminate against an employee so as to encourage or discourage his membership in a union . . . It is clear as well that this policy would forbid seniority status being used as a basis for perpetuating any discrimination against employees in violation of the Act.

Next, the Union, citing *Aeronautical Industrial Dist. Lodge 727 v. Campbell,* 337 U.S. 521 (1949), and *Bethlehem Steel Company (Shipbuilding Div.),* 136 NLRB 1500, 1503 (1962), enf. denied on another ground *sub nom., Industrial Union of Marine Workers v. N.L.R.B.,* 320 F.2d 615, 619-620 (C.A. 3, 1963), cert. denied, 375 U.S. 984, asserted that the Supreme Court and the Board have held that Steward seniority clauses are valid to the extent that they affect layoff and recall, and argued that they should be viewed as equally valid in cases where, as here, they affect other working conditions as well. In this respect, the Union claimed that such provisions are long established and common in collective bargaining agreements; that they operate to encourage employees to volunteer to

become stewards; and thus that they improve the quality of representation provided by the union and ultimately benefit all of the employees in the unit.

The Board properly rejected this claim too. As the *Great Dane* case makes clear, it is the Union's burden to establish that it was in fact motivated by this alleged purpose. However, as noted *supra*, p. 4, the record here contains no evidence as to the parties' intent in adopting the clause, nor is there any other evidence present to show that the clause functions to insure adequate Union representation, even though the Board at one point in this proceeding remanded the case precisely in order to afford the Union an opportunity to develop such evidence (A. 77, n. 9; 61-63). Thus, as the Board correctly held (A. 76-77), the Union here has simply failed to sustain its burden.

In any event, even assuming that the purpose and effect of the clause is to strengthen the Union's representational capacities, such a consideration is, as the Board properly held (A. 74), insufficient to overcome the serious infringement upon employees' statutory rights caused by this broad superseniority clause. Granting the validity of Steward superseniority in the case of layoff and recall as a device for ensuring continuity in the Union's representatives at the plant level,[5] the Union has not, as the Board noted (A. 74), "established in this case or elsewhere that superseniority going beyond layoff and recall serves any aim other than the impermissible one of giving union stewards special economic or other on-the-job benefits solely because of their position in the Union." While it may

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[5] Strictly speaking, this issue was not before the Board in this case inasmuch as the General Counsel confined his Complaint (A. 7-9) and Brief to an attack upon the Steward superseniority clause's impact on job conditions other than layoff and recall. See *National Maritime Union v. N.L.R.B.*, 423 F.2d 625, 626-627 (C.A. 2, 1970).

well be true, as the Union seemingly contends, that its efforts to recruit qualified employees to be stewards are enhanced by such advantages, nonetheless, as the Board stated (A. 76), it "remains the union's task to build and maintain its own organization, and where the immediate problem is simply a matter of encouraging employees to be stewards, a union can alone handle the situation simply by paying employees or by giving them other nonjob benefits for work in such a capacity." In short, unlike the layoff case where a union may find itself powerless to supply any real representation if it is unable to maintain the same steward continuously on the job, the Union has available to it a number of methods for attracting and appointing suitable persons to be stewards in the first instance without resorting to means which affect statutorily guaranteed rights. Nor is it determinative that the employees may possibly receive additional benefits as a result of the alleged improvement in the representation thus afforded. Apart from the wholly speculative nature of such a claim – particularly here, where the Union failed to produce direct evidence despite the remand (*supra*, p. 14) – such a factor simply cannot be considered controlling, for otherwise the Union could justify any infringement of employee rights on its part as legitimate merely because it might eventually lead to improved benefits. The Union, therefore, has failed to carry its burden under the *Great Dane* case of showing substantial and legitimate business considerations in this case for the superseniority clause extending beyond layoff and recall to other job conditions.[6]

Nothing in the *Campbell* case, *supra*, on which the Union relies, points to a different conclusion. In *Campbell*, the Supreme Court held that the

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[6] As the Board emphasized (A. 74), it is certainly possible that a union in some other case may be able to establish some justification for such a clause. The Union here clearly has not done so, however, and its failure to sustain its burden fully warrants the Board's adverse finding.

Selective Service Act (50 U.S.C. § 308), which requires that an employer restore a veteran to the same position he occupied before he entered the Service "without loss of seniority," did not render unlawful a contractual clause providing for superseniority for union stewards in the case of layoff. *Inter alia,* the Court noted that the veteran's rights were not "disadvantaged" by such a clause because under it he would have occupied a position of inferior seniority even if he had never entered the Service. 337 U.S. at 526, 527-528. Thus, the Court concluded that the "layoff of a veteran while a nonveteran [steward] with less time at the plant is retained, is wholly unrelated to the veteran's absence in the service." 337 U.S. at 528-529. The Court also noted that the term "seniority" as used in the Selective Service Act was intended to embrace the system commonly in practice in collective bargaining, and that (337 U.S. at 527, 528):

> One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end provision is made, as it was made here, against laying them off merely on the basis of temporal seniority. Because they are union chairmen they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights.
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> Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory.

Plainly, the *Campbell* decision is not controlling in the present case. As the Board pointed out (A. 75), *Campbell* was only concerned with the use of a steward superseniority clause to the extent that it affected employee rights in cases of layoff and recall. As the passages quoted above, *supra*, p. 16, indicate, the Court did not consider the impact of steward superseniority upon other working conditions, nor did it suggest that its ruling was intended to cover such cases. Since, as we have already shown, *supra*, pp. 14-15, there are substantial differences between the two situations, there is no reason to conclude that the restricted rationale of *Campbell* would extend to the broader problem presented here.

Before the Board, the Union pointed out that the Third Circuit in a series of Selective Service Act cases prior to *Campbell* – *i.e.*, *Gauweiler v. Elastic Stop Nut Corporation*, 162 F.2d 448 (C.A. 3, 1947); *Koury v. Elastic Stop Nut Corporation*, 162 F.2d 544 (C.A. 3, 1947); *Di Maggio v. Elastic Stop Nut Corporation*, 162 F.2d 546 (C.A. 3, 1947); and *Payne v. Wright Aeronautical Corporation*, 162 F.2d 549 (C.A. 3, 1947) – had held that steward superseniority clauses were valid both for purposes of layoff and job preferences. See *Koury*, 162 F.2d at 545; *Di Maggio*, 162 F.2d at 547. Because it was these rulings which caused the Supreme Court to grant certiorari in the contrary *Campbell* case from the Ninth Circuit, see 337 U.S. at 525, the Union argued that the Supreme Court's reversal of *Campbell* implied approval of the approach of the Third Circuit. There is, however, nothing in the Court's opinion in *Campbell* to indicate that the Court was doing anything other than passing on the specific issue presented in *Campbell*. Except for its reference to the conflict in the Circuits, the Court made no mention of the holdings of the Third Circuit, either approving or disapproving. In sum, the Court in *Campbell* simply followed its customary procedure and decided the particular case then before it. No other inferences can properly be drawn from its action.

Furthermore, even if steward superseniority clauses are valid for all purposes under the Selective Service Act, such a result is not binding upon

the Board. It is well established that principles, decisions and results developed under statutes not *in pari materia*, i.e., statutes regulating different classes of persons or having different purposes and objectives, are not freely interchangeable. As the Supreme Court stated in *Local 1976, Carpenters v. N.L.R.B.*, 357 U.S. 93, 110 (1958), "a determination under one statute [should not] be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes." Accord: *N.L.R.B. v. Radio & Television Engineers*, 272 F.2d 713, 715 (C.A. 2, 1959), aff'd, 364 U.S. 573 (1961) ("the two sections [8(b)(4)(D) and 303 of the Act] are not to be construed *in pari materia*. It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process"). See in general 73 Am Jur 2d, Statutes, § 186, *et seq.* The Selective Service Act is designed essentially to protect a veteran from job disadvantages because of his service in the Armed Forces. See *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 284 (1946). On the other hand, the Labor Act, which is involved here, is designed to protect an employee from job disadvantages because of his union membership or lack of it. Neither Act purports to have both goals. The principles applicable to each Act, therefore, are not necessarily the same, and this Court effectively so held in *Alvado v. General Motors Corporation*, 303 F.2d 718, 722 (C.A. 2, 1962), cert. den., 371 U.S. 925 ("the rule as to discrimination which encourages or discourages union membership is clearly different from the rule as to discrimination against veterans"). As we have already shown, the legal principles applicable to Labor Act problems fully support the Board's decision in the present case. The Board's finding of an unfair labor practice is entitled to enforcement, therefore, regardless of how the case might be resolved under the Selective Service Act.

4. Finally, contrary to the Union's claims, there is no basis for concluding that the employees' previous silence in the face of the Union's

illegal actions would either render the actions lawful or place them beyond the Board's reach. While the employees' failure to file charges in the past may bar a present remedy for prior illegal actions outside the statutory limitations period (see Section 10(b) of the Act), it in no way precludes relief for the Union's action in maintaining the illegal-on-their-face seniority provisions for the six months preceding the filing of the charge herein and thereafter. See *Local Lodge No. 1424, IAM v. N.L.R.B.*, 362 U.S. 411, 422, n. 14 (1960). Nor could the employees' silence be said to constitute a "waiver" of their right to challenge the Union's actions. Under Section 10(a) of the Act, the "Board is empowered to prevent any person from engaging in any unfair labor practice . . . affecting commerce," and this power cannot "be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Accordingly, even explicit agreements by private parties are ineffective to bar the Board from acting in the public interest to adjudicate and remedy unfair labor practices. As this Court noted in *Lodge 743, IAM v. United Aircraft Corp.*, 337 F.2d 5, 8 (C.A. 2, 1964), cert. denied, 380 U.S. 908, "the standard rule . . . enunciated in numerous decisions . . . is that the right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract." *A fortiorari*, the mere "silence", see *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716, 722 (C.A. 2, 1966), of individual employees in failing to protest their Union's securing of special benefits for Stewards cannot bar the Board from remedying this unlawful discrimination when it is brought to the Board's attention by proper charges. See also *N.L.R.B. v. Magnavox Co.*, 415 U.S. 322, 325-326 (1974); *N.L.R.B. v. Union of Marine Shipbuilding Workers*, 391 U.S. 418, 424 (1968); *Felter v. Southern Pacific Co.*, 359 U.S. 326, 336 (1959).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

JOHN D. BURGOYNE,
Attorney,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4218
MILK DRIVERS & DAIRY EMPLOYEES, LOCAL 338, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Cohen, Weiss and Simon
Att: Stanley M. Berman, Esq.
605 Third Avenue
New York, New York 10016

Elliott Moore

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 22nd day of December, 1975.